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CASE CLIPS

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CRIMINAL LAW ISSUES

OWENS v. STATE, No. 49A02-0010-CR-655, ___ N.E.2d ___ (Ind. Ct. App. Feb. 16, 2001).
RILEY, J.

Owens contends that the State failed to prove beyond a reasonable doubt that when he struck Officer Hamner he knew that Officer Hamner was a law enforcement officer. Therefore, Owens claims that the State failed to prove that he possessed the culpability required to convict him of battery of a law enforcement officer. We disagree.

. . . .

[W]e must consider two statutes. Ind. Code § 35-41-2-2(d) provides that "if a kind of culpability is required for commission of an offense, it is required with respect to every material element of the prohibited conduct." Ind. Code § 35-42-2-1(a)(2) provides that:

> a person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is: a Class D felony if it results in bodily injury to a law enforcement officer while the officer is engaged in the execution of his official duty. . . .

In *Markley* [*v. State*, 421 N.E.2d 20, 21 (Ind. Ct. App. 1981)], we noted that "prohibited conduct" and "element" within Ind. Code § 35-41-2-2(d) are not synonymous and if the legislature had intended culpability to apply to every material element, the phrase "of the prohibited conduct" would be superfluous. [Citation omitted.] We agree and hold that the element of "bodily injury to a law enforcement officer" is an aggravating circumstance, which, if proven beyond a reasonable doubt, increases the penalty for the offense committed without proof of any culpability separate from the culpability required for the conduct elements of the offense. [Citation omitted.] . . . [T]he legislature determined that the aggravating circumstance of battery resulting in bodily injury to a law enforcement officer was sufficient to increase the gravity of a battery offense because of the increased threat of injury to law enforcement officers. Moreover, this reasoning, coupled with the fact that "results in bodily injury to a law enforcement officer" is just that, a result, rather than prohibited conduct, leads us to the conclusion that Ind. Code § 35-41-2-2(d) does not apply to the "results in bodily injury to a law enforcement officer" element of a Class D felony battery.

Thus, the State was not required to prove beyond a reasonable doubt that Owens knew that Officer Hamner was a law enforcement officer when Owens struck him in the face. . . .

. . . .

DARDEN and ROBB, JJ., concurred.

PALMER v. STATE, No. 35A02-0008-CR-496, ___ N.E.2d ___ (Ind. Ct. App. Feb. 20, 2001).

BAKER, J.

> [T]he Dishroon [v. State, 722 N.E.2d 385 (Ind. Ct. App. 2000)] court observes that there is nothing in the language of I.C. § 35-50-6-6(a) to preclude a probationer from earning credit for time served on probation. However, it is apparent when comparing the statutory provisions pertaining to violations of terms of placement in community corrections program and violations of conditions of probation, that the legislature intended that probationers should not be afforded credit for time served in home detention as a condition of probation. Specifically, I.C. § 35-38-2.6-5, governing violation of terms of placement in community corrections programs, provides that "[i]f a person who is placed [in a community corrections program] violates the terms of the placement, the court may . . . [re]voke the placement and commit the person to the department of correction for the remainder of the person's sentence" (emphasis supplied). As the Purcell [v. State, 721 N.E.2d 220 (Ind. 1999)] court observed, "if an offender was not entitled to credit for time served, the commitment after revocation would not be for the 'remainder' of the offender's sentence but for the entire sentence." [Citation omitted.] On this basis, the Purcell court concluded that a person is entitled to credit for time served in a community corrections program and, by extension, is also entitled to credit for time served on home detention pursuant to such a program. Id.
>
> By comparison, I.C. § 35-38-2-3, which governs violation of conditions of probation, provides that if a court finds that a "person has violated a condition of his probation at anytime before termination of the [probation] period, . . . the court may . . . order execution of the sentence that was suspended at the time of initial sentencing." . . . Following the same reasoning employed by our supreme court in Purcell, if an offender was entitled to credit for time served, the legislature would have provided that commitment after revocation was for the remainder of the offender's sentence, not for the entire sentence imposed. We believe that the legislature's distinction between the community corrections context and the probation context with respect to credit for time served extends to situations where a court imposes home detention as a condition of either. Thus, it is our opinion that while a person is entitled to credit for time served on home detention as part of a community corrections program, a person is not similarly entitled to credit for time served as a condition of probation.
>
> . . . .
>
> [W]e conclude that Palmer is not entitled to credit for the time he served on home detention as a condition of his probation.
>
> . . . [I]t is our hope that the General Assembly will visit this entire alternative-sentencing morass. We urge the General Assembly to engage in a full review of probation, community-based corrections, good time credit, and the contradictions between I.C. Chapter 2.5 and I.C. Chapter 2.6., in order to establish what public policy should be in this area and to resolve what is now a patchwork quilt of contradiction and confusion.

BARNES, J., concurred without filing a separate written opinion.

BROOK, J., filed a separate written opinion in which he concurred, in part, as follows:

> Notwithstanding my concurrence in *Dishroon v. State*, 722 N.E.2d 385 (Ind. Ct. App. 2000), further consideration of the relevant statutes and the underlying purpose of probation has convinced me that Judge Baker's analysis is the sounder approach to this complicated issue. . . .

. . . .

CIVIL LAW ISSUES

BD. OF TRUSTEES OF UNIV. OF ALA. v. GARRETT, NO. 99-1240, ___ U.S. ___, ___S.CT. ___, ___ U.S.L.W. ____ (FEB. 21, 2001).

CHIEF JUSTICE REHNQUIST

We decide here whether employees of the State of Alabama may recover money damages by reason of the State's failure to comply with the provisions of Title I of the Americans with Disabilities Act of 1990 (ADA or Act), 104 Stat. 330, 42 U.S.C. §§ 12111-12117.[1] We hold that such suits are barred by the Eleventh Amendment. The Courts of Appeals are divided on this issue, compare Zimmerman v. Oregon Dept. of Justice, 170 F.3d 1169 (C.A.9 1999), with Bledsoe v. Palm Beach Cty. Soil & Water Conservation Dist., 133 F.3d 816 (C.A.11 1998). We are not disposed to decide the constitutional issue whether Title II, which has somewhat different remedial provisions from Title I, is appropriate legislation under § 5 of the Fourteenth Amendment when the parties have not favored us with briefing on the statutory question. To the extent the Court granted certiorari on the question whether respondents may sue their state employers for damages under Title II of the ADA, see this Court's Rule 24.1(a), that portion of the writ is dismissed as improvidently granted.

* * * *

Respondents contend that the inquiry as to unconstitutional discrimination should extend not only to States themselves, but to units of local governments, such as cities and counties. All of these, they say, are "state actors" for purposes of the Fourteenth Amendment. Brief for Respondents 8. This is quite true, but the Eleventh Amendment does not extend its immunity to units of local government. See Lincoln County v. Luning, 133 U.S. 529, 530, 10 S.Ct. 363, 33 L.Ed. 766 (1890). These entities are subject to private claims for damages under the ADA without Congress' ever having to rely on § 5 of the Fourteenth Amendment to render them so. It would make no sense to consider constitutional violations on their part, as well as by the States themselves, when only the States are the beneficiaries of the Eleventh Amendment.

* * * *

Congressional enactment of the ADA represents its judgment that there should be a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Congress is the final authority as to desirable public policy, but in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation. Those requirements are not met here, and to uphold the Act's application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court in Cleburne.[9] Section 5 does not so broadly enlarge congressional authority. The judgment of the Court of Appeals is therefore affirmed.

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[1] Respondents' complaints in the United States District Court alleged violations of both Title I and Title II of the ADA, and petitioners' "Question Presented" can be read to apply to both sections. See Brief for Petitioners i; Brief for United States I. Though the briefs of the parties discuss both sections in their constitutional arguments, no party has briefed the question whether Title II of the ADA, dealing with the "services, programs, or activities of a public entity," 42 U.S.C. § 12132, is available for claims of employment discrimination when Title I of the ADA expressly deals with that subject. See, e.g., Russello v. United States, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in

another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (internal quotation marks omitted).

[9] Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). In addition, state laws protecting the rights of persons with disabilities in employment and other aspects of life provide independent avenues of redress. See n. 5, supra.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. KENNEDY, J., filed a concurring opinion, in which O'CONNOR, J., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined.

HILL v. RAMEY, No. 40A01-0005-CV-166, ___ N.E.2d ___ (Ind. Ct.. App. Feb. 19, 2001).

MATTINGLY, J.

> [T]he Jackson County Sheriff's Department placed a copy of the Protective Order and summons addressed to Hill in the door of the house in Seymour, Indiana, where Hill's parents lived. [Footnote omitted.] . . .
>
> **. . . .**
>
> Hill moved into an apartment in Louisville, Kentucky, in December of 1998. Because the Seymour, Indiana, address was not his "dwelling house or usual place of abode," [footnote omitted] he claims proper service was not obtained, and the court was without personal jurisdiction to issue the April 28, 1998, Protective Order. At the hearing on Hill's motion for relief, he introduced into evidence a copy of his lease, a copy of a Kentucky driver's license showing the Louisville address, and copies of rent receipts and a cancelled check.
>
> Also at the hearing, Hill, his mother, and his father testified that Hill did not live at the Seymour, Indiana, house in April of 1999. Hill testified that he told Christina Ramey in December of 1998 that he had moved to Louisville. Hill's mother testified that if mail came to the house for Hill, she kept it for him until he picked it up. . . .
>
> Christina Ramey testified that Hill had not told her he had moved to Louisville, and that his last known address was the Seymour, Indiana, address.
>
> The trial court issued Findings of Fact and Conclusions of Law at Hill's request. The Conclusions of Law read:
>
> > . . .
> >
> > B. The Petitioner, Christina Ramey, stated she believed the Respondent was still living with his parents in April, 1999, and did not know he had moved to Louisville until July, 1999.
> >
> > C. Therefore Ms. Ramey believed the Respondent's last known address was at his parent's residence. This is where the papers were served by Deputy Wayman and where he sent a copy by first class mail.
> >
> > D. Mrs. Carol Hill testified she kept first class mail sent to Phillip Hill at 211 W. Harrison Drive, Seymour, Indiana, for him to pick up.
> >
> > E. Also, Sarah Hill signed for Philip Hill's certified mail in a criminal case. This certified mail was sent to his parent's address. This obviously got to Philip because he hired an attorney and appeared for a hearing on August 31, 1999.
> >
> > . . .
>
> [Citation to Record omitted.]
>
> **. . .**

[W]e believe this case to be controlled by *Mills v. Coil*, 647 N.E.2d 679 (Ind. Ct. App. 1995), and so find that the Protective Order is void for lack of personal jurisdiction.

In *Mills*, the plaintiff attempted service on the defendant at the defendant's last known address. The plaintiff was unaware that the defendant had moved out of the state three months before service was attempted. . . . We upheld the trial court's ruling, finding that "[s]ervice upon a defendant's former residence is insufficient to confer personal jurisdiction."[8] [Citation omitted.]

Even if Hill eventually received the summons and motion for protective order the Sheriff mailed to him at the Seymour address, such receipt does not, without more, guarantee sufficient service. "The mere fact that the defendant has knowledge of the action will not grant the court personal jurisdiction." *Barrow v. Pennington*, 700 N.E.2d 477, 479-80 (Ind. Ct. App. 1998).

. . . .

[8] The dissent, relying on *Kelly v. Bennett*, 732 N.E.2d 859 (Ind. Ct. App. 2000), would find service was effected "in substantial compliance with Trial Rule 4.1 by leaving a copy of the summons and petition *at what the Ramseys believed to be* Hill's dwelling house . . . ." (Emphasis supplied.) In *Kelly* we addressed the rule governing service on a *business address* and not the rule governing the case before us. Furthermore, we did not reach the issue whether the address to which the summons and complaint was a valid business address for the defendant. In *Kelly*, we found service insufficient where the summons and complaint was left by the sheriff at the defendant's business address but was not personally served or properly mailed in accordance with T.R. 4.1(A)(1). We acknowledge that the determination of what is or is not a person's dwelling house or abode turns on the particular facts of each case. *Doyle v. Barnett*, 658 N.E.2d 107, 109 (Ind. Ct. App. 1995). However, we must decline to adopt the purely subjective standard suggested by the dissent, under which a plaintiff's "belief," without more, would determine the location of a defendant's dwelling house for Rule 4.1 purposes.

MATHIAS, J., concurred.

ROBB, J., filed a separate written opinion in which she dissented, in part, as follows:

Because I believe the service attempted by the Rameys was reasonably calculated to inform Hill of the pending petition for protective order, I believe that the Protective Order was valid and the trial court properly denied Hill's motion for relief from judgment.

. . . .

In this case, the trial court found, and there was evidence to support the finding, that the Rameys believed, at the time the petition for protective order was filed, that Hill lived at the address to which they addressed service. Hill did at that time and continues to receive mail at that address, despite no longer residing there. . . .

. . . .

I believe the legal reasoning of Kelly is equally applicable to this case. Here, service was effected in substantial compliance with Trial Rule 4.1 by leaving a copy of the summons and petition at what the Rameys believed to be Hill's dwelling house followed by sending copies to Hill's last known address. This is not, as the majority suggests, a purely subjective standard, in that the evidence supported the Rameys actions: Hill had lived at that address, he still received mail at that address, and he had not told the Rameys that he had moved from that address. . . .

MATTER OF GUARDIANSHIP OF L. L., No. 40A01-0008-CV-253, ___ N.E.2d ___ (Ind. Ct. App. Feb. 21, 2001).

BARNES, J.

Initially, we observe that the termination of guardianship statute simply provides that termination may occur whenever it is no longer necessary for any reason. Ind. Code §29-3-12-1(c)(4). Strictly applying this statute, it is undisputed that the original grounds for granting Wilma guardianship over L.L. – i.e., because Trudy and her ex-husband were drug

and alcohol abusers and fought regularly – were no longer present when Trudy filed the current petition to terminate guardianship. However, our review of the case law in this area indicates that we generally have applied a more detailed test than might arguably be required by the plain language of the statute – whether the original grounds for granting the guardianship still exist – to determine whether a third party guardianship of a child should be terminated. This appears to be based on the concern that a guardianship proceeding in such circumstances is, in essence, a child custody proceeding that raises important concerns about parental rights and the "best interests" of children.

[W]e acknowledge that the opinions rendered by this court in the area of natural parent-third party custody disputes over the past three decades, whether those disputes have arisen out of guardianship proceedings or other custody proceedings, have not been entirely consistent. It is well established that when a parent initiates an action to obtain custody, a nonparent seeking to retain custody must bear the burden of overcoming the parent's presumptively superior right to custody. [Citation omitted.] How this presumption is rebutted, however, has been subject to differing interpretations. . . .

. . . .

Cases following Turpen [v. Turpen, 537 N.E.2d 537 (Ind. Ct. App. 1989)] have split on the extent to which it has been followed. Some have continued to adhere strictly to the Hendrickson [v. Bailey, 161 Ind. App. 388, 316 N.E.2d 376 (1974), cert. denied, 423 U.S. 868, 96 S. Ct. 131 (1975)] "mechanical approach." See Matter of Guardianship of R.B., 619 N.E.2d 952, 954 (Ind. Ct. App. 1993). Others have wholeheartedly adopted Turpen's holding. See In re Paternity of L.K.T., 665 N.E.2d 910, 912 (Ind. Ct. App. 1996). Between the thoughts articulated in these opinions are cases that acknowledge the three factors for rebutting the presumption in favor of the natural parent specified in Hendrickson, but recognize that other, nonspecific factors might exist in a particular case that would warrant rebutting that presumption. See, e.g., In re Marriage of Huber, 723 N.E.2d 973, 976 (Ind. Ct. App. 2000). Nevertheless, even when a case is analyzed using the "any evidence" test, we have held that a generalized finding that a child's placement with a third party as opposed to a natural parent is in his or her "best interests" is insufficient to rebut the parental preference presumption. Id.

Additionally, we have noticed that some cases purporting to rely on Hendrickson to various degrees have altered a portion of its holding. As evidenced by the above quote, Hendrickson requires that a child be placed in the custody of the third party if the presumption in favor of the natural parent(s) is rebutted. However, Huber and Guardianship of R.B. both indicate that if the presumption in favor of the parent(s) is rebutted, "then the question becomes whether it is in the best interests of the child to be placed in the custody of the third party." [Citations omitted.] Under these cases, therefore, a third party does not automatically gain custody upon rebuttal of the presumption, but a separate "best interests" analysis then ensues.

We believe the approach of these later cases is the sounder one. . . .

. . . .

Further adding to the potential confusion surrounding natural parent-third party custody disputes, our legislature amended the statutes governing certain custody proceedings in 1999 to provide that "de facto" custodians could be parties to such proceedings, in addition to the natural parents. . . . Once a court determines a "de facto custodian" exists and that individual has been made a party to a custody proceeding, the court shall consider the following factors in determining the child's "best interests," in addition to the usual "best interests" of the child factors contained in Indiana Code Sections 31-14-13-2 and 31-17-2-8:

(1) The wishes of the child's de facto custodian.

(2) The extent to which the child has been cared for, nurtured, and supported by the de facto custodian.

(3) The intent of the child's parent in placing the child with the de facto custodian.

(4) The circumstances under which the child was allowed to remain in the custody of the de facto custodian, including whether the child was placed with the de facto custodian to allow the parent seeking custody to:

(A) seek employment;
(B) work; or
(C) attend school.

Ind. Code §§31-14-13-2.5(b) and 31-17-2-8.5(b). Finally, "[t]he court shall award custody of the child to the child's de facto custodian if the court determines that it is in the best interests of the child." Ind. Code §§31-14-13-2.5(d) and 31-17-2-8.5(d).

Although Wilma does not clearly state so on appeal, at the trial court and now by implication she claims that these statutory amendments removed any presumption favoring the natural parent in a third party child custody dispute. . . . We do not believe the General Assembly intended in all cases to remove the presumption in favor of parents obtaining or retaining custody of their children through these "de facto custodian"statutory amendments. . . . .

After considering the relevant case law, the "de facto custodian" statutory amendments, and constitutional concerns, we hold that the following is the appropriate standard for courts to apply when considering a natural parent-third party child custody dispute. First, there is a presumption in all cases that the natural parent should have custody of his or her child. The third party bears the burden of overcoming this presumption by clear and cogent evidence. Evidence sufficient to rebut the presumption may, but need not necessarily, consist of the parent's present unfitness, or past abandonment of the child such that the affections of the child and third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child. However, a general finding that it would be in the child's "best interest" to be placed in the third party's custody is not sufficient to rebut the presumption. If the presumption is rebutted, then the court engages in a general "best interests" analysis. The court may, but is not required to, be guided by the "best interests" factors listed in Indiana Code Sections 31-14-13-2, 31-14-13-2.5, 31-17-2-8, and 31-17-2-8.5, if the proceeding is not one explicitly governed by those sections.

. . . .

[W]e cannot conclude that the findings support the judgment to deny Trudy's petition to terminate Wilma's guardianship because they were insufficient to rebut the presumption in favor of Trudy's obtaining custody of L.L. . . .

. . . .

The trial court's findings do not reveal the existence of any unfitness or long-term voluntary abandonment or relinquishment of L.L. on the part of Trudy; nor do they reveal the existence of any compelling, real, and permanent interests of L.L. that would be best served by his remaining in the custody of Wilma. Therefore, the presumption in favor of Trudy's obtaining custody of L.L. was not rebutted. Finally, we believe that affirming the trial court's decision to permit Wilma to retain custody of L.L. could have potentially adverse public policy consequences. For the sake of children, society should encourage parents who are experiencing difficulties raising them to take advantage of an available "safety net," such as a grandparent who is willing to accept temporary custody of a child. It would discourage such action by parents in difficult straits and discourage efforts to "reform" or

better their life situation if their chances of later reuniting with their children were reduced. We reverse and remand with instructions to terminate the guardianship. On remand, the trial court may enter such orders as it deems necessary regarding counseling for the parties and other related matters, which we trust will be followed by the parties.

BAKER and BROOK, JJ., concurred.

ST. VINCENT HOSP. AND HEALTH CARE CTR. v. STEELE, No. 34A02-0005-CV-294, ___ N.E.2d ___ (Ind. Ct. App. Feb. 21, 2001).

HOFFMAN, Senior Judge

At issue in the present case is whether Indiana's Wage Payment Statute's[5] provisions for liquidated damages and attorneys' fees are applicable. St. Vincent argues that the trial court erred by concluding that the statute applies. St. Vincent argues that those provisions govern only the frequency with which an employer pays an employee and not the amount the employer pays.

. . . .

We have discovered two conflicting lines of cases dealing with the issue of application of this statute. . . .

. . . .

In *Sallee v. Mason*, 714 N.E.2d 757 (Ind. Ct. App. 1999), Mason sold her accounting practice and became an employee of the purchaser. Mason's employment contract provided for several things including the requirement that she work 2280 hours annually. In return she was to be paid an annual salary of $34,200.00 or $15.00 per hour, payable in bimonthly installments. The employer was to review her salary on an annual basis for cost of living adjustments. Mason appealed the trial court's decision on her counterclaim against Sallee. The trial court awarded Mason $2,651.55 in unpaid wages. Mason contended that the trial court erred by failing to award her liquidated damages and attorney fees pursuant to Ind. Code §22-2-5-2. A panel of this court agreed holding that Sallee was liable for liquidated damages and attorney fees for failing to pay Mason for time worked in excess of the 2,280 hours required annually. 714 N.E.2d at 764.

In these cases, the employee complained about incomplete compensation, or not being paid the total amount due. These employees did not complain about the frequency with which they were paid.

. . . .

The present case is distinguishable from the cases cited by St. Vincent. In *Hendershot* [*v. Carey*, 616 N.E.2d 412 (Ind. Ct. App. 1993)], the employer was found not liable for an option agreed to by its employees that resulted in four weeks between installments. Arguably, the statement that the wage payment statute did not apply in cases where the amount of pay was an issue is dicta, since the main issue before that panel involved frequency. In *Huff* [*v. Biomet*, 654 N.E.2d 830 (Ind. Ct. App. 1995)], the contract provided for unilateral modification of the commission amount, plus there was no evidence that the employee, during his lifetime, took action to bring the compensation issue under the terms of the statute. There was no evidence that he demanded to be paid semi-monthly or bi-weekly, or that he contested the reduction in his commission pay. In *Haxton* [*v. McClure Oil Corp., Inc.,* 697 N.E.2d 1277 (Ind. Ct. App. 1998)], the employee was not entitled under the terms of her contract to full pay for the hours she worked after giving notice to her employer. Therefore, the statute was inapplicable to that issue. However, she was entitled to full vacation pay because her vacation pay had accrued prior to the violation of the notice requirement of her contract. Liquidated damages and attorneys fees were not awarded based upon the frequency statement made in *Hendershot* and reiterated in *Huff*. In [*Indiana*

[5] Ind. Code §22-2-5.2

Department of Labor v.] Richard [732 N.E.2d 810 (Ind. Ct. App. 2000), *transmitted on transfer* December 4, 2000], the statute did not apply because the wage claim was made after the employee was terminated from employment. We offered an alternative holding that there was no allegation regarding the frequency of payments citing *Hendershot*, *Huff* and *Haxton*.

In the present case, Steele was still employed by St. Vincent at the time demands were made for total compensation. St. Vincent argues that it had a good faith basis for withholding a portion of the wages earned by Steele because of the Stark legislation and the HCFA interpretation. That argument fails here. We previously have held that there is no good faith exception contained in the statute. [Citation omitted.]

Steele is correct that if Ind. Code §22-2-5-2 only deals with the frequency of pay then an employer can avoid the penalty provisions of the statute by tendering $1.00 bi-weekly or semi-monthly regardless of the amount of salary agreed to by the parties. However, the statute also makes reference to paying the employee the *amount due*. We believe that the instant case is distinguishable from the cases relied upon by St. Vincent. The trial court correctly found that Indiana's Wage Payment Statute applied to the case at bar. Steele is entitled to liquidated damages and attorney fees under that statute.

FRIEDLANDER and MATTINGLY, JJ., concurred.

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Jane Seigel, Executive Director
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